

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEROY EMIL WONS, JR.,

Defendant-Appellant.

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UNPUBLISHED

July 30, 2002

No. 229088

Van Buren Circuit Court

LC No. 00-011727-FC

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of twenty to fifty years' imprisonment for the murder conviction, as well as a two year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant was charged with open murder and felony-firearm, arising from an incident at his sister's apartment in September 1999, during which an ex-boyfriend of defendant's sister suffered a fatal shotgun wound. The level of defendant's responsibility was the principal issue at trial, with the prosecution seeking a conviction for first-degree premeditated murder.

Defendant's sister, who had a history of domestic violence incidents with the deceased, was the primary witness at trial. She testified that, on the evening in question, the deceased was drunk and harassing her and that she telephoned defendant to come over to her apartment with his shotgun to "scare" the deceased. She said that she merely wanted defendant to bring the gun over and leave it with her, because the gun was often kept at her apartment. Similarly, defendant testified that he did not intend to use the gun that evening.

Defendant arrived at his sister's apartment with a garbage bag wrapped around three pieces of a twelve-gauge shotgun. He sat down and put the shotgun together and put a shell in the shotgun, although he claimed that he did not "pump" the shotgun, because he "didn't need to." Defendant's sister testified that defendant was putting the gun next to her television set when the deceased grabbed its barrel and either "taunted" defendant to shoot him or threatened to shoot her and defendant if the deceased "got a hold of the gun." After admitting that she had

lied when she told the police she was in the bathroom and did not see the shooting, defendant's sister testified that she saw defendant and the deceased wrestle for control of the shotgun and stumble backwards over a chair, causing the shotgun to discharge the fatal shot. Defendant's sister denied her previous statements to police officers that the deceased grabbed the gun because defendant had pointed the gun at the deceased and told the deceased that he was tired of the deceased "messing" with his sister. However, she conceded at trial that it may have "looked like [defendant] was pointing [the gun] towards my kitchen."

The prosecution called a forensic pathologist who testified that the deceased was shot in the left side of his lower back from a distance of one to three yards and that the path of the bullet was almost parallel with the floor. However, defendant's sister had "no idea" how to explain the forensic evidence indicating that the bullet entered the deceased's back, and she denied telling the police officers that the deceased was walking away with his back to defendant and was six to seven feet away from defendant when defendant pulled the trigger. The prosecution impeached her credibility with her statements to police officers after the incident, as well as her preliminary examination testimony, that: (1) defendant loaded the shotgun and said, "I'm tired of you messing with my sister," (2) the deceased turned and walked away, saying "go ahead and shoot me," and (3) defendant pulled the trigger from a distance of six to seven feet, shooting the deceased in the back.

Last, the prosecution introduced the testimony of several witnesses to whom defendant had made threats about shooting the deceased with his shotgun. Defendant told these witnesses that: (1) he wanted to kill the deceased because he was hurting his sister, (2) he was going to kill the deceased, (3) he would kill the deceased if he "keep his stuff up," (4) he was going to "kick his ass," (5) he was tired of his sister being harassed by the deceased and was going to "take care of it himself," and (6) he wanted to take his gun and kill the deceased.

Defendant, who testified at trial in his own defense, maintained that the discharge of the weapon was accidental. Like his sister, defendant testified that the deceased "lunged" at him, catching him off guard and wrestling for control of the gun. Similarly, defendant testified that the fatal shot was dislodged when he pushed the deceased and they both fell backwards. Defendant said that when the shot was fired he was in "another place, another time," apparently a reference to when defendant saw his father stabbed to death. Further, defendant told the jury that he "didn't mean to take this man's life." He dismissed the threats relayed during the prosecution's case-in-chief as idle threats, testifying that he never intended to follow through on his threats to kill the deceased. In response to defendant's testimony that he is "not a violent guy," the prosecution elicited on cross-examination that defendant wore a jacket on which he had written "cop killer," and that defendant had previously been arrested for assaulting police officers.

In addition to the felony-firearm charge, the trial court instructed the jury regarding the elements of first-degree murder, second-degree murder, voluntary manslaughter, and negligent or careless use of a firearm. The jury convicted defendant of second-degree murder, as well as felony-firearm.

## II

Defendant first argues that the prosecution presented insufficient evidence to support his second-degree murder conviction. We disagree.

“When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

“The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Here, defendant challenges only the evidence supporting the malice element, arguing that there was no evidence that he acted with the necessary state of mind. “Malice” is defined as: (1) the intent to kill, (2) the intent to cause great bodily harm, or (3) the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464. The malice required to support a second-degree murder conviction can be inferred from evidence that the defendant “intentionally set in motion a force likely to cause death or great bodily harm.” *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999), quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

Here, defendant conceded that he had repeatedly threatened to kill the deceased, that he showed up at his sister’s home with a shotgun, that he assembled the shotgun, and that he chambered a round. Further, the prosecution presented evidence that defendant pointed the shotgun at the deceased and pulled the trigger when the deceased was a distance of six to seven feet away from defendant, shooting the deceased in the back. Lastly, the prosecution presented forensic evidence that was consistent with its theory of the case. A rational trier of fact could have inferred from this evidence that defendant intentionally set in motion a force likely to cause death or great bodily harm. Accordingly, we find that sufficient evidence was presented at trial to support defendant’s second-degree murder conviction.

## III

Defendant next argues that he was denied a fair trial by the ineffective assistance of his trial counsel. Defendant claims that counsel was ineffective by failing to adequately prepare a rational defense for trial. Specifically, defendant claims that trial counsel failed to effectively argue that the shooting was an accident, failed to argue that defendant was not guilty, failed to call the mental health professionals who treated defendant over the years, failed to pursue a defense based on defendant’s “tenuous” mental state, and failed to emphasize the taunting by the deceased and the emotionally charged relationship between defendant and the deceased. Defendant also claims that his counsel was ineffective in failing to object to testimony about a pending investigation into a break-in of the deceased’s apartment three weeks before the shooting, as well as testimony about defendant’s prior assaults. We disagree.

A defendant who claims that he has been denied the effective assistance of counsel must establish: (1) that the performance of his counsel was below an objective standard of

reasonableness under prevailing professional norms and (2) a reasonable probability exists that the outcome of the proceedings would have been different absent counsel's errors. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Also, the defendant must show that, but for counsel's error, a reasonable probability exists that the outcome of the trial would have been different. *Id.* Defendant failed to move for a *Ginther*<sup>1</sup> hearing or a new trial based on ineffective assistance of counsel. Thus, this Court's review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). We conclude that defendant has failed to overcome the heavy burden of proving that he received ineffective assistance of counsel.

As a threshold matter, it is apparent that defense counsel's options in defending his client were limited by: (1) defendant's public statements to the media about accidentally shooting a man, (2) defendant's statement to the police that he brought the gun to his sister's apartment, loaded it, and accidentally shot the deceased when he and the deceased stumbled, and (3) evidence of defendant's threats against the deceased. Within these constraints, counsel pursued a defense based upon an accidental discharge of the shotgun, a lack of criminal intent, or that defendant was negligent or careless in his use of the shotgun. Counsel elicited testimony from defendant in support of the accident theory and argued during closing argument how it was "possible" that the deceased's back could have been exposed during the struggle for control of the shotgun. A lawyer does not render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Further, the jury apparently accepted defense counsel's argument that defendant did not premeditate the murder because it did not find defendant guilty of first-degree murder, as sought by the prosecution.

Although counsel did not call the mental health professionals who treated defendant over the years, defense counsel elicited testimony from defendant and referred in closing argument to the fact that defendant had been in counseling for eleven or twelve years. The record also reveals that, in questioning many of the witnesses, defense counsel elicited testimony emphasizing the emotionally charged relationship between defendant and the deceased. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Assuming *arguendo* that defense counsel should have objected to the testimony about the break-in of the deceased's apartment or the reference to defendant's prior assaults, where defendant opened the door to such testimony by stating that he was "not a violent guy," defendant has not shown a reasonable probability that the absence of objection affected the outcome of the proceedings against him. The police officer investigating the break-in testified that no one had been charged in that incident. Further, the reference by the police officer that defendant had "assaults in the past" was not outcome-determinative. Indeed, had defense counsel requested a curative instruction, he may have placed undue emphasis on the topic.

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

In short, defendant has not overcome the heavy burden of proving that counsel was ineffective.

#### IV

Defendant next argues that he was denied a fair trial because of misconduct by the prosecutor. Defendant contends that the prosecutor improperly interjected evidence about the pending investigation into the break-in of the deceased's apartment, the fact that defendant wore a jacket inscribed with the phrase "cop killer," and the prosecutor's alleged denigration of defendant and personal vouching for prosecution witnesses during closing argument. Because defendant did not object to any of these instances below, he must demonstrate a plain error that was prejudicial, i.e., that could have affected the outcome of his trial. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Upon review of the evidence, we find that defendant has not borne this burden because none of the alleged instances of misconduct affected the outcome of defendant's trial.

#### V

Defendant argues that he was denied a fair trial because the trial court failed to read certain criminal jury instructions and submitted the issues to the jury in a special question format. However, defense counsel did not object either to the instructions the court gave the jury or to their format, despite being given an opportunity to do so. Failure to object to jury instructions precludes appellate relief absent a plain error affecting substantial rights. MCL 768.29; *Carines*, *supra* at 763-764.

The instructions given by the trial court included all elements of the crimes charged and did not exclude consideration of material issues, defenses, and theories for which there was supporting evidence. See *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, the instructions fairly presented the issues for trial and sufficiently protected defendant's rights. *Id.* Accordingly, trial counsel was not ineffective for failing to object, and relief is not necessary to avoid manifest injustice.

Affirmed.

/s/ Kathleen Jansen  
/s/ Michael R. Smolenski  
/s/ Kurtis T. Wilder